

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

v.
C-ANN COAL CO.

IBLA 85-75

Decided September 19, 1986

Appeal from a decision of Administrative Law Judge David Torbett affirming the issuance of Notice of Violation No. 80-2-56-55. NX-0-218-R.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

While, in general, under the Surface Mining Control and Reclamation Act of 1977 surface coal mining operations may not be conducted without first obtaining a permit from either a state agency or OSM, the Act does not apply to the extraction of coal for commercial purposes when the surface mining operation affects 2 acres or less.

2. Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-Acre

A party contesting OSM's jurisdiction must state and prove as an affirmative defense the grounds upon which the claim is based, and it must not only come forward with supporting evidence but also must carry the ultimate burden of persuasion if OSM attempts to rebut the evidence.

3. Surface Mining Control and Reclamation Act of 1977: Variances and Exemption: 2-Acre

Under 30 CFR 700.11(b), where an entity that is extracting coal intends to affect more than 2 acres, that entity is not exempted from coverage under the Surface Mining Control and Reclamation Act of 1977 regardless of whether or not it has actually affected 2 acres.

APPEARANCES: Calvin R. Tackett, Esq., James W. Herald, Esq., Whitesburg, Kentucky, for C-Ann Coal Company; Barbara I. Berschler, Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

C-Ann Coal Company (C-Ann) appeals from a decision of Administrative Law Judge David Torbett upholding the issuance of Notice of Violation (NOV) No. 80-2-56-55 following a hearing held May 2, 1984, in London, Kentucky. The NOV was issued by Gary W. Hall, then a reclamation specialist with the Office of Surface Mining Reclamation and Enforcement (OSM), based on an inspection of the #10 mine site he conducted on June 9, 1980. The NOV was issued for four violations of the surface mining statute and regulations. ^{1/} At the hearing, the parties stipulated to the validity of three of the violations, provided that OSM could establish jurisdiction over the mining operation (Tr. 10, 14-15). In his decision, Judge Torbett found that sufficient facts had been proven to establish the additional violation, mining without a state permit. As to the issue of OSM's jurisdiction, he found that the evidence stood in "equipoise." Based on the allocation of the burden of proof to C-Ann, Judge Torbett concluded that OSM had established jurisdiction.

On appeal, C-Ann does not directly challenge Judge Torbett's finding as to the propriety of issuing the NOV for mining without a license from the State. It does, however, attack his finding that the facts introduced at the hearing established OSM's jurisdiction. Of course, if Judge Torbett was in error as to this conclusion, his subsidiary determination that C-Ann was mining without a permit in violation of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201 (1982), must also fall.

[1] SMCRA established both initial (interim) and permanent regulatory programs. This appeal involves the interim regulatory program. In general, surface coal mining operations may not be conducted without first obtaining a permit from either a state agency or OSM. 30 U.S.C. § 1256(a) (1982). However, the Act does not apply to, inter alia, "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less." 30 U.S.C. § 1278 (1982). Regulations establishing performance standards for the initial regulatory program similarly require coal mine operators to obtain permits. 30 CFR 710.11. Consistent with the statute, the regulations do not apply to operations which affect 2 acres or less. 30 CFR

^{1/} The violations cited were: (1) operating a mine without obtaining a permit from the state regulatory authority in violation of 30 U.S.C. § 1252 (1982), (2) failure to post mine identification signs in violation of 30 U.S.C. § 717.12(B) (1982) (the reference should have been to 30 CFR 717.12(b)), (3) failure to pass all surface drainage from the disturbed area through a sedimentation pond prior to its leaving the disturbed area in violation of 30 CFR 717.17(a), and (4) failure to maintain access road properly in violation of 30 CFR 717.17(j)(3).

700.11(b). 2/ The instant appeal involves the question whether the mining operation is in excess of 2 acres.

The base area of C-Ann's mining operation was established by a map included in an application for a permit filed with the State of Kentucky in 1979 for V & B Coal Company, Mine #10. The application was for a permit for an area of 1.13 acres, consisting of 0.62 acres for access roads and 0.51 acres at the face up (Respondent's Exh. 4, Tr. 26-27). Inspector Hall testified that, during his inspection of the mine site, he observed four areas of disturbance in addition to those indicated on the map. These were: (1) an area between and near the intersection of the mine's access roads, (2) the area covered by a sedimentation pond, (3) an additional face-up area, and (4) "a storage area that the operator was using for reject material that was being hand-picked from the coal on this particular day" (Tr. 30). He estimated that the total area of disturbance was 2.6 to 2.75 acres (Tr. 31, 39, 51, 65). He further testified that the additional disturbance between the access roads was two-tenths of an acre (Tr. 38, 69-70) and that both the additional face-up area and the sedimentation pond occupied two-tenths to a quarter acre each (Tr. 87, 104-105).

Much of Hall's testimony was directed to the refuse or gob site. Hall stated that he observed reject material being hand sorted (Tr. 30, 40). Further, on cross-examination, Hall declared that he saw the reject rock being taken "off the permit as proposed in the original application, and piled on the banks" (Tr. 66). Hall testified that gob was stored on the bench cut and "also over the side of the hill into the timber," but admitted that he had not gone into the timber to examine the spoil (Tr. 68). He estimated that the total area of this disturbance was 0.75 acres.

During his testimony Hall also stated that his estimate of the size of the affected area was based on his comparison of the disturbed area he observed and the 1979 map (Tr. 30-31). On cross-examination he repeated this testimony and also stated that his conclusion that the gob area was

2/ We note that, although not raised in this appeal, the issue of whether the affected area includes areas above underground mine workings was raised by the parties at the hearing and briefed before Judge Torbett. Based on this Board's decision in S & M Coal Co. v. OSM, 79 IBLA 350, 91 I.D. 159 (1984), Judge Torbett ruled that the areas could not be included in the calculation of the affected acreage because no evidence of actual disturbance above the underground workings had been introduced at the hearing. This ruling was correct. In denying a motion for reconsideration of our S & M decision, we reviewed the controlling regulatory provisions for the interim program and noted that "[t]here is nothing in these provisions to indicate that areas above underground workings are meant to be included in the calculation of the surface area affected by underground mining when such areas are not affected by surface operations associated with the underground coal mining." S & M Coal Co. v. OSM (On Reconsideration) (unpublished order, July 16, 1984). This rule, however, only applies to the interim program, as here, and not to acreage computations under the permanent program. See S & S Coal Co., 87 IBLA 350, 354 (1985).

not included in the 1.13 acres described in the 1979 map was based on a comparison of the 1979 map with the disturbed area he observed, although he acknowledged he could not say how much of the gob had been accumulated by C-Ann's operations (Tr. 67-69). When later pressed, Hall stated that "other than the immediate area in which they were dumping" he could not determine the age of the gob and that he had not made any attempt to determine whether the gob existed prior to the mining operation because he "felt most of the preexisting area was actually already shown to be under permit" and that the additional areas of gob he considered to be off the 1979 map were more recent because they extended into the trees while the older material was in front of the mine (Tr. 85-86). Finally, Hall stated that his understanding of the state permitting requirements was that areas of preexisting disturbance were to be indicated on permit application maps and that the disposal area in question was "not shown as that--as existing --it's shown as being virgin on the '79 map, as not being disturbed" (Tr. 101).

Hall also testified that a map submitted as part of a 1980 permit application was close to the total area of disturbance he found on the day of his inspection, although the additional spoil storage area was larger on the map and the mine face-up area was different (Tr. 47-48). The application was for an area of 3 acres (Tr. 48). On cross-examination, Hall acknowledged that the 1980 map would include both preexisting and anticipated areas of disturbance (Tr. 98-100).

C-Ann's evidence was presented by three witnesses: Ray Adams and Gary Boyd, both of Adams & Boyd Engineering Company, who had done work at the mine site, and Vance Breeding, owner and operator of the mine.

Gary Boyd testified that he surveyed the area shown by the 1979 map (Tr. 111) and had assisted in its preparation (Tr. 126). He stated that, at the time of his survey, areas of disturbance existed which were not so indicated on the 1979 map, and that older mine workings also existed at the site (Tr. 113-14, 117-19, 126, 130, 139). He further testified that these areas of disturbance were not included in his survey and the map because he understood that the state enforcement authorities wanted maps to portray only those areas which were to be permitted (Tr. 114, 118-19, 126-28). For this reason, Boyd said, his survey and the map were intended to show only the areas of use as indicated by Vance Breeding and not areas previously disturbed (Tr. 129, 138, 140-41). Boyd also testified that the state inspector had done a "walk through" at the mine site and had not made any corrections to the map, although he admitted that he was not present at the time (Tr. 115, 138-39, 142-43).

Boyd further testified that he had surveyed and prepared the 1980 map in October of 1980 and that it included the entire area of disturbance from previous mining at the site because the area was needed to store gob (Tr. 117-19). He said that the 1.1 acres indicated on the 1980 application as an existing disturbance merely meant that the gob pile was already there in 1980, but he stated that he did not know if any of it was due to operations by C-Ann (Tr. 118, 123, 132). He also testified that an affidavit stating that the original face-up of the mine had been done in 1975 was made part

of the 1980 application in order to show that highwall elimination requirements need not be met (Tr. 120; Petitioner's Exh. 4). Finally, Boyd professed disagreement with Hall's estimate that the total disturbed area was 2.53 acres (Tr. 121-22).

Ray Adams testified that he had been engaged by C-Ann to set spads within the underground workings, and that in 1979 to June of 1980 he had made six trips to the mine for this purpose as well as making several additional trips (Tr. 146, 152-53). He also testified that in the 1950's and 1960's he had done work for another mine on the same seam (Tr. 148-50). He stated that he was aware of prior accumulations of job at the site (Tr. 148), and that during his visits he did not see any additional areas of disturbance other than the sedimentation pond (Tr. 152-53). Adams also testified that during his trips to the site in 1979 and 1980 he sometimes saw rocks being picked from the coal brought out of the mine but did not see any accumulation of spoil and did not know what was done with it (Tr. 147-48, 154-56). Concerning the 1980 map, he testified that the spoil area shown on it had not been created during 1979-80 (Tr. 149). Rather, he stated, he assumed the spoil was due to older mines at the site because it existed when he first visited the mine and because he saw vegetation growing from it and that it had deteriorated (Tr. 150). Adams also testified that he had assisted Boyd in preparing the 1979 map, and he confirmed that the preexisting spoil piles were excluded from the acreage indicated on the map because the map was intended to show only areas of use as delineated by Breeding (Tr. 151-52).

Vance Breeding testified that he was the owner of the mine and that he originally operated it as a contractor for another company which bought all of his production on a raw ton basis until it went bankrupt in 1981 (Tr. 157-58). On cross-examination he stated that he had begun work at the site in 1977, but he did not start mining until 1978 (Tr. 174-75). Breeding also testified that he initiated his attempts to obtain a State permit in 1979 when he learned that the other company had not obtained permits as it had promised (Tr. 158-59). Concerning the accumulation of spoil, he stated that the original face-up of the mine had been done in 1974 or 1975 and that the spoil had been pushed over the hill (Tr. 160). He denied creating or using the spoil pile in 1979, but admitted using it after his permit application had been prepared in 1980 (Tr. 161, 163, 179). Prior to this time, he acknowledged rock picking had occurred, but he asserted that the rock was stacked and then hauled away to be used as fill at a building construction site (Tr. 162-63).

Judge Torbett found that the evidence clearly established that there were 0.20 acres of additional disturbance to access roads, 0.25 acres covered by the sediment pond, and 0.20 acres of additional face-up. Added to the base area, these resulted in a total affected area of 1.78 acres (See Respondent's Brief at 3). The addition of these three areas has not been seriously contravened by appellant. Thus, the determination of OSM's jurisdiction turns on the evidence as to the fourth additional area of disturbance, the area allegedly used for storing reject material. In discussing this area in his decision, Judge Torbett stated:

The proof presented by the parties is in direct conflict as to the use of that spoil area. The Respondent's inspector states that he saw spoil being dumped on the pile during his inspection. However, the Applicant presented witnesses who testified that spoil had never been dumped on that pile and that the pile predated the Applicant's mining operation.

The undersigned has no reason to disbelieve the Respondent's inspector or the Applicant's witnesses. Therefore, the undersigned is of the opinion that the proof in this case stands in equipoise as to this issue. As the ultimate burden of persuasion in a review case is by regulation placed upon the Applicant, the undersigned has no choice but to find in this case that the spoil pile area of .75 acres should be included in calculating the total disturbed area. The undersigned is of the opinion that the Respondent has made a prima facie case that the total disturbed area of the mine is 2.53 acres. The Applicant has not overcome this prima facie case.

Thus, Judge Torbett resolved the conflicting evidence in favor of OSM based on a burden of proof analysis.

Appellant suggests initially that Judge Torbett erred in his conclusion that OSM had established a prima facie case. Hall, however, directly testified that he saw spoil transported to an area off the area shown by the 1979 map and that this gob pile aggregated 0.75 acres. OSM's evidence, standing by itself, was clearly sufficient to establish a prima facie case that the spoil area should be attributed to C-Ann's operations.

C-Ann's evidence to the contrary consisted of the testimony of its three witnesses that there had been prior mining at the site and that the spoil had been created by these mines as well as by the face-up of the current mine in 1975. In addition, Breeding testified that his operation had not dumped spoil on the gob pile until late in 1980 and that prior to that time it had been transported to be used as fill. He expressly denied that he had used the spoil pile in 1979 at the time of Hall's inspection.

Thus, Breeding testified that the gob pile was not used in 1980, whereas Hall testified that he saw it being used. Obviously, both statements could not be true. This is precisely the type of irreconcilable conflict in testimony that normally requires the fact-finder to bring to bear his or her powers of observation and determine who was more credible. See generally United States v. Chartrand, 11 IBLA 194, 80 I.D. 408 (1973). In the instant case, however, no such finding was made. On the contrary, Judge Torbett, in essence, said he believed both and thus determined the evidence to be in equipoise. Since both, as a matter of fact, cannot be correct, the Judge's fact-finding is fatally flawed. Accordingly, the deference with which we view findings of fact by an Administrative Law Judge based on his opportunity to observe the demeanor of the various witnesses and form his opinion cannot be exercised in the instant case. We must, therefore, consider all the testimony de novo.

[2] Viewing the record as a whole, we find the weight of evidence establishes that the gob pile preexisted C-Ann's mining operation. We also find, however, that C-Ann did use at least part of the gob pile during 1980 for refuse storage. It may well be that only a small part of the pile was used. Be that as it may, it was appellant's obligation to establish the limits of its use. As we have noted, a party contesting OSM's jurisdiction must state and prove as an affirmative defense the grounds upon which the claim is based. Harry Smith Construction Co. v. OSM, 78 IBLA 27, 29, (1983). Since Breeding's testimony was to the effect that none of the pile was used, a statement which we do not accept, C-Ann necessarily eschewed any attempt to delimit the area of its use. This being the case, we have no choice but to conclude, on the evidence of record, that the entire gob pile of 0.75 acres was used in 1980 and that, therefore, the 2-acre exemption did not apply to the No. 10 mine.

[3] Our conclusion in this regard is fortified by consideration of a matter not addressed in the decision below. The applicable regulation implementing the 2-acre exemption presently provides: "This chapter does not apply to the extraction of coal for commercial purposes where the surface coal mining and reclamation operation, together, with any related operations, has or will have an affected area of two acres or less." (Emphasis supplied.) 30 CFR 700.11(b). The present regulation was amended on August 2, 1982, 47 FR 33424, to include, inter alia, the phrase "or will have." See 30 CFR 700.11(b) (1982). In amending this language, the Department was very careful to point out that:

This is a change in wording, not a change in substance, from the previous regulation. OSM believes that this is a proper interpretation of the Act and its legislative history, which makes it clear that Congress intended to provide an exemption only for small operations and not for the first two acres of any larger operation.

47 FR 33425 (Aug. 2, 1982). See also 47 FR 41, 47-48 (Jan. 4, 1982).

The preamble to the 1982 amendments explained the operation of this regulation as follows:

[U]nder this revised § 700.11(b), if an operation was intended from its beginning to affect 20 acres it will not be entitled to the exemption at any time. If an operation were originally intended to affect less than two acres, but the person conducting the operation changed his or her intention and decided to mine a total of four acres, at the time that intent changed the operation would cease to be exempt.

47 FR 33425 (Aug. 2, 1982). Thus, when appellant was cited in 1980, a violation of SMCRA could be found even if it was concluded that appellant had not then affected 2 acres, if it could be shown that it was anticipated at that time that more than 2 acres would be affected in the future.

Evidence was submitted at the hearing that the three NOV's which were not factually contested were terminated on various dates because of

appellant's corrective measures. A number of extensions were granted for compliance with the NOV relating to failure to obtain a permit from the State regulatory authority. However, on September 12, 1980, having ascertained that appellant had not yet filed a permit application, Hall issued cessation order No. 80-2-56-15 (Tr. 45-46; Respondent's Exh. 16) which he mailed to appellant. ^{3/}

Hall testified that on his visit to the mine site on September 11, 1980, no mining was occurring (Tr. 78). As appellant subsequently established, mining had ceased at that time because of a restraining order which the State regulatory body had obtained. See Petitioner's Exh. 1. Appellant thereupon submitted a permit application evidencing that the affected area was 3 acres. The NOV was accordingly terminated on October 30, 1980.

Appellant argued that the mere fact that the 1980 map showed a total of 3 acres as being permitted was not an admission that it had used such acreage in the past but merely showed that it intended to use this acreage. We do not necessarily disagree. However, inasmuch as appellant continued to mine after receipt of the NOV until further mining was enjoined and, at that time, a permit application was submitted embracing 3 acres, it seems apparent that there was no sudden change in intent but rather that the ultimate intent to affect more than 2 acres preexisted the cessation of mining in 1980. This being the case, the intent to affect more than 2 acres, before the issuance of the restraining order, would have required the obtention of a permit regardless of whether or not 2 acres had actually been affected. Thus, the NOV could be sustained on this basis alone. We find that the record establishes that appellant affected more than 2 acres, and further, that appellant intended to affect more than 2 acres at the time the NOV issued.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

James L. Burski
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

Kathryn A. Lynn
Administrative Judge
Alternate Member

^{3/} The Board expresses no opinion as to whether service of this document was efficacious in light of appellant's allegations that it was never received. We agree with Judge Torbett that this matter was not properly part of the instant case.

